

**IN THE COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**

**ORDER AMENDING RULE 4
OF THE COURT OF COMMON PLEAS
RULES OF CIVIL PROCEDURE**

This 20th day of November, 2008, IT IS ORDERED that:

- 1) Court of Common Pleas Civil Rule 4 is amended by deleting the material in brackets and including the material underlined, as follows:

Rule 4. Process.

(a) *Issuance of Writs.* Upon the commencement of an action, the Clerk of the Court shall forthwith cause to issue the process specified in the praecipe and shall cause to deliver [it] for service to the sheriff of the county or counties specified in the praecipe or to a person especially appointed by the Court to serve it. The party requesting the issuance of process shall prepare a form thereof for signature by the Clerk [of Court] under the seal of the Court. Upon direction of the plaintiff in the praecipe, separate or additional process shall issue against any defendants.

(b) *Attachment Under Chapter 35, Title 10, Delaware Code.* (1) The proof required for the issuance of a mesne writ of attachment under Chapter 35, Title 10, Delaware Code, will be satisfied by filing with the complaint an affidavit of plaintiff or some credible person setting forth the facts required by the applicable statute. In addition to the facts required by the applicable statute, such affidavit shall also state:

(A) As to each nonresident defendant whose appearance is sought to be compelled, the defendant's last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

(B) The following information as to the property of each defendant sought to be seized:

(I) A reasonable description thereof.

(II) The estimated amount and value thereof.

(III) The nature of the defendant's title or interest therein, and if such title or interest be equitable in nature, the name of the holder of the legal title.

(IV) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(V) The reason for the omission of any of the required statements.

(2) *Bond Required of Plaintiff.* No mesne writ of attachment shall be issued until plaintiff, in such proceedings, shall give bond, in an amount and with surety to be approved by the Court out of which the writ is to be issued, conditioned that if the suit shall not be prosecuted with effect, or if the judgment rendered therein shall be in favor of a defendant, the plaintiff will pay any and all costs which may be awarded to a defendant, together with any and all damages, not exceeding the amount of the bond, which a defendant in the suit may have sustained by reason of such attachment; for this purpose, a bond executed by an approved surety company alone, without joinder of plaintiff shall be deemed a compliance with the provisions of this Rule. In fixing the amount of such bond, the Court may consider the kind of property to be seized, the estimated value thereof, the possibility of a loss to a defendant as the result of the seizure, and other relevant matters.

(3) *Release of Attached Property.* (A) Any nonresident defendant whose property shall have been seized upon a writ of foreign attachment and who shall have entered a general appearance in the cause may move for an order releasing such property or any part thereof from seizure. The Court shall then release such property forthwith unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment thereafter secured and in that event plaintiff shall also give bond with approved surety, in an amount at least equal to the current value of the property seized, conditioned that if the cause shall not be prosecuted with effect, or if judgment rendered therein shall be in favor of a defendant, the plaintiff will pay all damages, including costs, which such defendant may have sustained by reason of such seizure, not exceeding the amount of such bond.

(B) Any property seized under a mesne writ of attachment will be released from seizure, in whole or in part, upon defendant's furnishing such security for its release as is approved by the Court, conditioned for the payment of any judgment that may be recovered in the proceedings with costs, in an amount at least equal to the current value of the property to be released or the amount claimed in the suit, whichever is the lesser; provided, however, that the furnishing of such security shall not of itself constitute a general appearance.

(4) A writ of foreign attachment may issue against any individual or incorporated association not an inhabitant of this State or against a foreign corporation, although joined as parties defendant with other nonresident or resident parties, with the same effect as if such nonresident defendant were the only defendant.

(5) Every mesne writ of attachment issued shall specify therein a reasonable description of the property to be seized, and the amount claimed by the plaintiff. The Clerk of the Court shall cause to be published a copy of such writ in a newspaper of general

circulation in the county in which the writ is issued at least once within 20 days after the issuance of such writ. Within 7 days after the filing of the sheriff's return of a writ of mesne attachment, the Clerk of the Court shall, in addition to making the required publication, send by registered mail to every nonresident defendant whose appearance is sought to be compelled, at the address furnished by plaintiff, if such address is known, certified copies of the complaint, affidavit, writ and return, filed in the cause. No publication will be required if all defendants shall have been personally served prior to the time publication would otherwise take place, and no mailing will be required to any defendant who has been personally served.

(6) Except in cases of garnishment, if it appears from the description of the property to be seized that it is not susceptible of physical seizure within the State, the plaintiff shall upon institution of suit obtain from the Court an order, a certified copy of which shall be served with the writ, upon the person, persons or corporation having possession or custody of the property or control of its transfer, directing such person, persons or corporation to:

(A) Retain the property and recognize no transfer thereof until further order of the Court;

(B) Forthwith make a notation upon any records pertaining to the property that such property is held pursuant to the order of the Court; and

(C) Within 10 days after the date of such service, file a certificate under oath with the Clerk of the Court, specifying:

(I) Such defendant's property, if any, of which it has possession, custody or control, or control of its transfer;

(II) Whether the title or interest of each such defendant is legal or beneficial; and

(III) If legal, the name and address of the holder of any equitable or beneficial title or interest therein, if known, and if beneficial, the name and address of the holder of the legal title thereto, if known.

(7) *Costs.* The plaintiff shall deposit with the Clerk of the Court an amount sufficient to defray the cost of publication in any case where such publication is required in addition to the usual deposit for costs, before a writ of foreign attachment will be issued.

(8) In any action commenced by mesne writ of attachment, the defendant shall serve the answer (and if required, an affidavit of defense) within 40 days after the date of the attachment of the property or the service of the writ upon a garnishee, as the case may be. After the expiration of such 40-day period, or after the defendant's appearance, whichever first occurs, the action shall proceed as in suits commenced by summons.

(9) If any attached property is of a perishable nature, or will cause undue expense in its keeping, the Court may order the attaching officer, on due notice, to sell the same, and

retain the proceeds of sale, subject to the order of the Court. No property attached under a mesne writ of attachment or garnishment shall be sold except upon order of the Court, which order shall specify the notice required and all other pertinent matters relating to such sale.

(c) *Contents of Writ: Generally.* The process shall bear the date of its issuance, be signed or bear an electronic signature by the Clerk of the Court or 1 of the Clerk's Deputies, be under the seal of the Court, contain the name of the Court and the names of the parties, state the name of the official or other person to whom it is directed, the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these Rules require the defendant to appear and defend, and shall notify the defendant that in case of the failure to do so, judgment by default will be rendered against the defendant for the relief demanded in the complaint.

(d) *By Whom Served.* Service of process shall be made by the sheriff to whom the writ is directed, by a deputy sheriff, or by some person specially appointed by the Court for that purpose, except that a subpoena may be served as provided in Rule 45.

(e) *Process and Complaint to Be Served Together.* The process, complaint and affidavits, if any, shall be served together. The Clerk [of the Court] shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(f) *Service of Process; How Made.*

(1) *Summons.* Service of summons shall be made as follows:

(I) Upon an individual other than an infant or an incompetent person by delivering a copy of the summons, complaint and affidavit, if any, to that individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or, by delivering copies thereof to an agent authorized by appointment or by law to receive service of process.

(II)(a) [Omitted].

(b) Upon an infant under the age of 18 years, if such infant has a guardian in this State, by service upon such guardian in the same manner as upon an individual, if the guardian is an individual, or in the same manner as upon a corporation, if the guardian is a corporation; and if there is no such guardian, by service in the same manner as upon an individual upon an adult person with whom such infant resides or has his or her place of abode.

(c) Upon an incompetent person, if such person has a trustee or guardian in this State, by service upon such trustee or guardian, in the same manner as upon an individual, if the trustee or guardian is an individual; or in the same manner as upon a corporation, if such trustee or guardian is a corporation; and if there is no such trustee or guardian, by service in the same manner as upon an individual, upon an adult person with whom such

incompetent person resides or has his or her place of abode.

(d) As used herein, trustee or guardian refers to one appointed by the court of competent jurisdiction in this State; provided, however, that a trustee or guardian duly appointed by a court of competent jurisdiction of another state may accept service and/or appear, upon filing proof of state appointment in the cause here pending.

(e) Upon an infant or incompetent person, not a resident of the State, in the same manner as upon a competent adult person who is not an inhabitant of or found within the State.

(III) Upon a domestic or foreign corporation or upon a partnership or unincorporated association which is subject to suit under common name by delivering copies of the summons, complaint and affidavit, if any, to an officer, a managing or general agent or, to any other agent authorized by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(IV) Upon a municipal corporation or other governmental organization subject to suit by delivering a copy of the summons, complaint and affidavit, if any, to the chief executive officer thereof or by serving copies thereof in the manner prescribed by law for the service of summons upon such defendant.

(V) Upon a defendant of any class referred to in subsection (I) and (III) of this rule, it is also sufficient if the summons, complaint and affidavit, if any, are served in the manner prescribed by any statute.

(VI) Whenever a statute, rule of Court or an order of Court provides for service of summons or of a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the State, service shall be made under the circumstances and in the manner prescribed by the statute, rule or order.

(2) *Attachment.* Service of attachment or garnishee process shall be made in the same manner, as provided in Rule 4(f), on those persons, firms or corporations subject to such service in this State. If garnishees are summoned upon a writ of mesne attachment, the person serving the writ shall leave with them a copy of the writ, the complaint and affidavit. If execution of the writ requires seizure of personal property, the sheriff shall levy thereon and make the return in the same manner as heretofore.

(3) *Capias.* The writ of capias shall be served as provided by statute. The person serving the writ shall deliver to the defendant a copy of the writ, complaint and affidavit.

(4) [Omitted].

(5) *Service of Original Process Other Than Summons, Attachment or Capias.* Service of original process other than summons, attachment, or capias shall be made as provided by statute or order of court.

(g) *Return of Process.* Original process, whether an original, alias or pluries writ, shall be returnable 20 days after the issuance of the writ. The person serving the process shall make return thereof to the Court promptly after service and in any event, on the return day thereof. Process which cannot be served before the return day thereof shall be returned on the return day and such return shall set forth the reasons why service could not be had. If service is made by a person other than by an officer or his deputy, his return shall be verified. Failure to make a return or proof of service shall not affect the validity of service.

[(h) *Actions in Which Service of Process Is Secured Pursuant to 10 Del.C. § 3104, § 3112 or § 3113.* In an action in which the plaintiff serves process pursuant to 10 Del.C. § 3104, § 3112 or § 3113, the defendant's return receipt and the affidavit of the plaintiff or the plaintiff's attorney of the defendant's nonresidence and the sending of a copy of the complaint with the notice required by the statute shall be filed as an amendment to the complaint within 10 days of the receiving by the plaintiff or the plaintiff's attorney of the defendant's return receipt; provided, however, that the amendment shall not be served upon the parties in accordance with the provisions of *Rule 5(a)*.]

(h) *Actions in Which Service of Process is Secured Pursuant to 10 Del. C. §3104 or §3113.* In an action in which the plaintiff serves process pursuant to 10 Del. C. §3104 or §3113, unless otherwise directed by the Court, the affidavit of the plaintiff or the plaintiff's attorney declaring the defendant's nonresidency and the manner in which service of process was made shall be filed with the Court within 10 days of the plaintiff's receipt of proof of any such service on the nonresident together with the proof of service.

(1) When service is made by mail, proof of service shall include a receipt signed by the person accepting service, or other official proof of delivery deemed satisfactory to the Court, unless service was refused. Such proof shall constitute presumptive evidence that the mail was received by the defendant.

(2) When service is made by mail, a notation of refusal shall constitute presumptive evidence that the refusal was by the defendant.

(i) *Amendment of Process.* At any time in its discretion and upon such terms as it deems just, the Court may allow any process or return of proof of service to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(j) *Summons: Time Limit for Service.* If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

- 2) This amendment is effective February 16, 2009.

Chief Judge

Judge

Judge

Judge

Judge

Judge

Judge

Judge

Judge